No. 4 Orig.

Brief of MacFarland for Respondent

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United States Supreme Court.

EX PARTE: IN THE MATTER

OF

JONAS GROSSMAYER, PETITIONER.

4 Orig.

BRIEF ON BEHALF OF THE RESPONDENT.

W. W. MACFARLAND,
Of Counsel for the Respondent.

Evening Post Job Printing House, New York.

United States Supreme Court.

EX PARTE: IN THE MATTER
OF
JONAS GROSSMAYER, Petitioner.

BRIEF ON BEHALF OF THE RESPONDENT.

Statement.

R. G. Dun & Company is a partnership consisting of R. G. Dun and Robert D. Douglas. The firm conducts a mercantile agency. Those agencies have become such important factors in the commercial world that Courts take judicial notice of the nature of the business.

The Eaton, &c., Co. *v.* Avery, 83 N. Y., 31.

The business requires the service of numerous local agents with different duties. In the present case service of process was made on one of those local agents in the State of Texas. The motion in the Court below for judgment necessarily admits the undisputed facts set forth in the affidavit, that the defendants are non-resident copartners; that they were not served with process, and that the local agent had no authority to accept service. The motion is founded on the proposition that, notwithstanding these facts, the plaintiff is entitled to judgment.

ARGUMENT.

First.

The petition does not state a case suitable for a writ of mandamus.

I.—This is not the case of a refusal by a court to take jurisdiction of a cause and proceed therein, as, for example, a refusal to recognize the lawful removal of a cause from a State court, and it is only in cases of which the Court erroneously declines to take judicial cognizance that the remedy by mandamus is available.

In re Hohorst, 150 U. S., 653.
Hallon Parker, Petitioner, 131 U. S., 221.
Ex parte Parker, 120 U. S., 737.
Ex parte Railway Co., 103 U. S., 794.
Ex parte Brown, 116 U. S., 401.
Ex parte Morgan, 114 U. S., 174.

The above authorities sufficiently illustrate the distinction between the cases in which mandamus and a writ of error or an appeal are the appropriate remedies.

II.—In the present case the Court did not refuse to take jurisdiction of the action, but after hearing the parties and considering their proofs the Court decided that the service of process was invalid and therefore that the plaintiff could not proceed to judgment at that stage. The decision was embodied in an order duly made and entered, and there is the same right of review by writ of error as in the case of final judgment; it is expressly so decided in Goldey *v.* Morning News, 156 U. S., 518.

III.—The particular form in which, as matter of practice, the question as to the validity of the ser-

vice of process may be raised is of no importance; various methods are equally appropriate.

Brooks *v.* Dun, 51 Fed. Rep., 139, 147, 148.

IV.—The action has not been dismissed, but it cannot be made effective and be proceeded in, until there shall have been due service of process. In retaining the action but declining to give judgment until due proof of such service the Court followed the rule laid down in Harkness *v.* Hyde, 98 U. S., 476, and in Brooks *v.* Dun (above), p. 148.

But it is enough to say, that if the decision of the Court was erroneous, the remedy is by writ of error, not mandamus, for when a party may have the former remedy he certainly cannot at his election have the latter. It is unnecessary to add that the defendants were at liberty to appear, and did appear, for the special purpose of raising the question as to the validity of the service of the summons, and for no other purpose.

Second.

The service of the summons was void; there was therefore no jurisdiction to render the judgment demanded against the defendants.

I.—In the first place neither of the defendants were residents of the Eastern District of Texas, nor were they found therein. The return of the Marshal states (Petition, p. 25) that the summons was served upon "John Fowler, the local agent of R. G. Dun & Co.," but in this naked statement there is nothing to suggest the legal equivalent of a personal service, and the affidavit of Fowler (p. 12) shows the absence of any authority to accept service.

II.—Brooks *v.* Dun (51 Fed. Rep., p. 138), decided 1892, and cited above, is almost identical with the present case, and the defendants were the same. It was also an action for damages, and there was service of process upon a local agent. It was brought in a State court of Tennessee and removed into the Federal court, for which purpose only the defendants appeared specially. There was then in the Federal court a "motion to dismiss for want of proper service" (p. 139). The plaintiff in the action relied on the following provision of a statute of the State:

"When a corporation, company or individual has an officer or agency or resident director in any county other than that in which the chief officer or principal resides, the service of process may be made on any agent or clerk employed therein, in all actions brought in such county against said company, growing out of the business of or connected with said company or principal's business" (Thomp. & S. Code, Sec. 2834*a*; Mill & V. Code, Secs. 3516, 3539).

Judge Hammond in a very elaborate opinion states the history of the provision. He doubts whether the words "companies" or "individuals" include non-residents or foreigners, and says, "service of process upon companies or individuals can be made without legislation upon the person, but service upon 'corporations' must be by legislation, * * * and we must not confuse these separate purposes of the Code: One to authorize and regulate the service of process on corporations, and the other, and the very most that can be claimed for it, providing a very limited substituted process for companies and individuals; that is to say, a service not personal in the sense of the common or general law governing the service of process on individuals, but something else than this in place of it, as where some statutes authorize service on a wife or other person residing at the domicile of the defendant, or

by mailing the process to the door, or the like. It is my opinion that the substituted service so provided by this act for 'companies' and 'individuals' *was not intended for any non-resident or foreign 'company' or 'individual' not a 'corporation,'* whatever may be said of it. But if this provision of the Tennessee Code ought to be construed as to authorize a service of process for non-resident partners, in a case like this, upon their resident agent, without any attachment of or proceeding against their property, or if such construction had been given to it by the Supreme Court of the State, *this Court would not necessarily be bound to follow it, or to so adjudge, as its constitutionality would still be open to consideration here.* Since the leading case of Pennoyer *v.* Neff, 91 U. S., 714 (decided by the Supreme Court of the United States in 1877), it seems to be well settled that a personal judgment against a non-resident in a suit where no service was had on him in the State, and he has not appeared in the suit, *is without any validity.*"

Judge Hammond then proceeds to examine at great lenth all the previous decisions on the point. Summing up he says: "Since the case of Pennoyer *v.* Neff (*supra*), the question there decided has been often before the Circuit Courts, and in various forms, and their decisions have been uniformily adverse to the validity of service in such cases as this without personal service of the defendant within the State where the suit is brought, or his voluntary appearance therein," citing numerous cases.

III.—Since the decision in the above case of Brooks *v.* Dun, the whole subject has again been exhaustively examined by this Court in Goldey *v. Morning News* (156 U. S., 518). It is there said:

"It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within

its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government (D'Arcy *v.* Ketcham, 11 How., 165; Knowles *v.* Gaslight Co., 19 Wal., 58; Hall *v.* Lanning, 91 U. S., 160; Pennoyer *v.* Neff, 95 U. S., 614; York *v.* Texas, 137 U. S., 15; Wilson *v.* Seligman, 144 U. S., 41.)."

"For example, under the provisions of the Constitution of the United States and the acts of Congress, by which judgments of the courts of one State are to be given full faith and credit in the courts of another State, or of the United States, such a judgement is not entitled to any force or effect, unless the defendant was duly served with notice of the action in which the judgment was rendered, or waived the want of such notice (Constitution, Art. 4, Sec. 1; Acts of May 26, 1790, C. 11, Stat. 122, and March 27th, 1804, c. 56, Stat., 299; Rev. Stat., Sec. 904, Knowles *v.* Gaslight Co. and Pennoyer *v.* Neff, above cited." See also Harkness *v.* Hyde (98 U. S., 476); Mexican Ry. Co. *v.* Pinckney (149 U. S., 194); Dun *v.* Brooks (*supra*).

IV.—The rule of decision in such cases is to be found not in State statutes but in the laws of the United States. Thus in Goldey *v. Morning News*, it is said: "The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a State. The Legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit

the effect of such removal." To the same point, Toland *v.* Sprague (12 Peters, p. 328); Main *v.* Second National Bank (6 Bissel, 26).

V.—The distinction between this rule of *substantive* law, and a mere regulation or *practice* in regard to the service of process upon persons within the jurisdiction is seen in Amy *v.* Watertown (130 U. S., 302).

VI.—In fact there is no State statute even in verbal expression relevant to the case. The petitioner relies upon the following article of the Revised Statutes of Texas—Article 1223:

"In any suit against a foreign, private or public corporation, joint stock company or association, or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company or association or acting corporation or association."

But plainly this article has no relation to partnerships, they are not mentioned. The succeeding article, 1224, expressly provides for the service of process "in suits against partners." It is in the folllowing words:

"In suits against partners the citation may be served upon one of the firm, and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

If legislation should define a partnership as a corporation joint stock company or association such folly would not be attended by legal consequences. A partnership would still remain what, by the rules of law it is, with all the incidents attaching to that relation.

But no such legislative eccentricity is perceived. The word "association," on which the petitioner founds his argument, is indefinite,

and may be intended to embrace some collective body between a corporation and a partnership, or it may be a common case of tautology and synonomous with "joint stock company." But it is entirely certain that it does not define a copartnership, for that relation connotes a very definite and precise set of legal ideas and rules that no one would dream of indicating by any other name than partnership, for no other would be at all applicable. Moreover, as we have seen, the statute in expres sterms makes the distinction between partnership and the association intended.

Third.

The authorities cited in support of the petition are not relevant.

I.—These authorities all belong to an entirely different domain of law, so far as process and service thereof is concerned. They relate to corporations as pointed out by Judge Hammond in Brooks *v.* Dun (*supra*). The error in the reasoning is in the first *assuming* that the defendants constitute a corporation, or its equivalent, and then applying the authorities to that false hypothesis.

II.—In support of the validity of the service the following cases are cited:

1. Conn. Mut. Life Ins. Co. *v.* Spratley (172 U. S., 602). This case involved the question whether a corporation was still doing business in a State, and it was one of mixed law and fact.

2. In *ex parte* Schollenberger it was decided that a foreign corporation might be required to comply with the provisions of a statute in relation to the

service of legal process as a condition of being permitted to carry on its business in the State, and the doctrine in that case is affirmed in the one last above mentioned.

III.—The cases cited in support of petitioner's right to have a writ of mandamus have been noticed under the first point of the brief, where it is pointed out that they are irrelevant.

Fourth.

It is submitted that the prayer of the petition should be denied. But if the foregoing argument against the petition should not be approved, then it is submitted that the order, to be entered upon the petition, should give the defendants leave to answer in the court below, where the action is still pending.

W. W. MacFarland,
Of Counsel for the Respondent.

NOTE: It was essential to the jurisdiction of the Circuit Court that the plaintiff should be a resident of the District, as neither of the defendants were residents thereof. It was further essential that the fact of such residence should appear in the petition or complaint by which the plaintiff's suit was commenced. (Mex. Cen. Ry. Co. vs. Pinkney, 149 U. S. 194). The plaintiff in his original petition or complaint alleges that he is a citizen of Galveston County in the Eastern District of Texas. It is submitted whether that is a sufficient allegation of residence.